Public Prosecutor v Vincent Jude a/l Xavier

HIGH COURT (SHAH ALAM) — CRIMINAL TRIAL NO 45–105 OF 2007
BADARIAH SAHAMID JC
30 OCTOBER 2009

Criminal Law — Penal Code — ss 149 and 302 — Common intention to cause death — Failure to call material witness — Whether absence caused serious gap in prosecution's case — Whether testimony vital — Whether prima facie case established

Criminal Procedure — Trial — Adjournment — Application under s 259 of the Criminal Procedure Code — Whether witnesses could be procured if adjournment granted — Whether prosecution showed manifestly lackadaisical attitude — Criminal Procedure Code s 259

Evidence — Documentary evidence — Medical reports — Pathologist and chemist reports — Admissibility of — Whether documentary evidence sufficient — Whether prosecution failed to demonstrate valid reasons to invoke s 340 of the Criminal Procedure Code

The accused was charged under ss 149 and 302 of the Penal Code for being a member of an unlawful assembly of persons who had the common intention of causing death of the deceased, Kannah a/l Maran, and one or more than one of the assembly had acted on that common intention and caused the death of the deceased. Although the prosecution had called ten witnesses to prove its case, they had failed to produce two material witnesses whose testimonies were crucial to establish the prosecution case namely, the chemist who had analysed the blood samples on the alleged murder weapons and the doctor who performed the post mortem. The doctor who conducted the post mortem was out of the country on study leave, but had returned to Malaysia twice during the course of the trial. Apart from that, the third witness absent was Ramesh a/l Elappan, the complainant. He had been subjected to restricted residence since 2006. In order to procure the attendance of the pathologist, the prosecution had, during the trial, requested an adjournment under s 259 of the Criminal Procedure Code ('CPC'). The prosecution had also sought to admit the pathologist's medical report under

s 340 of the CPC. One of the issues raised was whether in the absence of the pathologist, a medical report can be admitted under s 340 of the CPC.

Held, acquitting and discharging the accused:

(1) The prosecution had demonstrated a manifestly lackadaisical attitude towards the prosecution of this case. In addition, the prosecution could not assure the court that even if the requested adjournment were to be granted, the witnesses could be procured. More than sufficient time and latitude had been given to the prosecution to prepare its case and the court would be failing in its duty to administer proceedings justly if further indulgence was granted (see para 19).

(2) The testimony of the pathologist was especially crucial in order to prove the cause of death. It was consistent with the principle that such testimony should be through the direct oral evidence of the pathologist, where a cross-examination would allow the evidence to be tested and evaluated. From the documentary evidence, it had been showed that the pathologist had returned to Malaysia twice since the trial dates were scheduled. It was not a case where the pathologist was untraceable but rather no effort had been made to trace the pathologist (see paras 15 & 35–36).

(3) Certainly, it could not be the intention of the Legislature that s 340 of the CPC can be invoked in order to rectify a serious omission by the prosecution to secure the attendance of the medical officer. This would certainly be contrary to the best evidence 'rule' and highly prejudicial to the accused (see para 36).

(4) The evidence of the chemist, who had analysed the blood samples on the alleged murder weapons (parang, cangkul, kayu) and found them to be the blood of the deceased, was material to link the injuries inflicted on the deceased to the weapons. Without the evidence of the chemist there was a serious gap in the chain of evidence linking the injuries sustained by the deceased to the murder weapons (see paras 39–40).

(5) In the absence of crucial medical evidence of the pathologist to ascertain the cause of death, the absence of the chemist and the inadmissibility of the chemist report to ascertain the weapons used to inflict the fatal injuries on the deceased, as well as the lack of credible evidence from witnesses present at the scene of the crime at the material time, no prima facie case had been proved against the accused (see para 48).

[Bahasa Malaysia summary

Tertuduh dituduh di bawah ss 149 dan 302 Kanun Keseksaan kerana menjadi ahli perhimpunan kumpulan haram yang mempunyai niat bersama untuk menyebabkan kematian si mati, Kannah a/l Maran, dan satu atau lebih

daripada kumpulan tersebut telah bertindak atas niat bersama itu dan menyebabkan kematian si mati. Walaupun pihak pendakwaan telah memanggil sepuluh saksi untuk membuktikan kesnya, mereka telah gagal untuk mengemukakan dua saksi penting yang keterangan mereka sangat penting untuk membuktikan kes pihak pendakwaan, iaitu ahli kimia yang menganalisis contoh darah atas senjata untuk membunuh dan doktor yang menjalankan bedah siasat. Doktor yang menjalankan bedah siasat telah keluar negara atas cuti belajar, tetapi telah pulang ke Malaysia dua kali semasa perbicaraan sedang berjalan. Selain daripada itu, saksi ketiga yang tidak hadir ialah Ramesh a/l Elappan, pengadu. Dia telah dikenakan perintah tahanan terhad semenjak 2006. Untuk memastikan kehadiran pakar patologi tersebut, pihak pendakwaan, semasa perbicaraan telah memohon penangguhan di bawah s 259 Kanun Prosedur Jenayah ('KPJ'). Pihak pendakwaan juga memohon untuk mengemukakan laporan pakar patologi di bawah s 30 KPJ. Salah satu isu yang ditimbulkan adalah sama ada dalam ketidakhadiran pakar patologi, laporan kesihatan boleh diterima di bawah s 340 KPJ.

Diputuskan, membebaskan dan melepaskan tertuduh:

(1) Pihak pendakwaan telah menunjukkan sikap yang nyata acuh tak acuh terhadap pendakwaan kes ini. Malah, pihak pendakwaan tidak dapat menyatakan dengan pasti kepada mahkamah bahawa jika penangguhan yang dipohon dibenarkan, saksi-saksi tersebut boleh dikemukakan. Masa dan kebebasan yang lebih dari mencukupi telah diberikan kepada pihak pendakwaan untuk menyediakan kesnya dan mahkamah akan gagal dalam kewajipannya menjalankan prosiding secara adil jika permohonan lanjut dibenarkan (lihat perenggan 19).

(2) Keterangan pakar patologi adalah secara khususnya penting untuk membuktikan sebab kematian. Ia konsisten dengan prinsip bahawa keterangan sedemikian sewajarnya melalui keterangan lisan terus pakar patologi tersebut, di mana pemeriksaan balas akan memberi peluang keterangan tersebut diuji dan dinilai. Daripada keterangan dokumentar, telah ditunjukkan bahawa pakar patologi telah pulang ke Malaysia dua kali semenjak tarikh-tarikh perbicaraan ditetapkan. Ia bukan kes di mana pakar patologi tidak dapat dicari tetapi tidak ada usaha dibuat untuk mencari pakar patologi tersebut (lihat perenggan 15 & 36–36).

(3) Sememangnya, tidak mungkin menjadi niat Perundangan bahawa s 340 KPJ boleh dibangkitkan untuk membetulkan ketinggalan serius oleh pihak pendakwaan untuk memastikan kehadiran pegawai perubatan. Ini sememangnya bercanggah dengan keterangan 'best evidence rule' dan amat menjejaskan kepada tertuduh (lihat perenggan 36).

(4) Keterangan ahli kimia, yang telah menganalisis contoh darah atas senjata pembunuhan yang didakwa (parang, cangkul, kayu) dan mendapati ia adalah darah si mati, adalah penting untuk

menghubungkan kecederaan yang dikenakan ke atas si mati dengan senjata tersebut. Tanpa keterangan ahli kimia, wujud jurang yang serius dalam rantaian keterangan menjalinkan kecederaan yang dialami oleh si mati dengan senjata pembunuhan (lihat perenggan 39–40).

(5) Dalam ketiadaan keterangan perubatan yang penting daripada pakar patologi untuk memastikan sebab kematian, ketidakhadiran ahli kimia dan laporan kimia yang tidak boleh diterima untuk memastikan senjata yang digunakan untuk menyebabkan kecederaan teruk kepada si mati, dan juga ketiadaan keterangan yang boleh diterima daripada saksi-saksi yang hadir di tempat jenayah pada masa material, kes prima facie tidak dibuktikan terhadap tertuduh (lihat perenggan 48).]

Notes

For a case on medical reports, see 7(1) *Mallal's Digest* (4th Ed, 2010 Reissue) para 1310.

For cases on adjournment, see 5(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 4552–4568.

For cases on Penal Code in general, see 4 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1262–2016.

Cases referred to

Abdul Jalil bin Abdul Satar v PP [1991] 2 MLJ 194, SC (refd)

Lembaga Kemajuan Tanah Persekutuan (Felda) & Anor v Awang Soh bin Mamat & Ors [2009] 4 MLJ 610, CA (refd)

Looi Kow Chai & Anor v PP [2003] 2 MLJ 65; [2003] 1 CLJ 734, CA (refd)

PP v Chee Kon Fatt [1991] 3 CLJ 2564, HC (refd)

PP v Dulamit bin Sulaiman & Anor [2009] 9 MLJ 249, HC (refd)

PP v Haji Harun bin Haji Idris [1977] 1 MLJ 14, HC (refd)

Ti Chuee Hiang v PP [1995] 2 MLJ 433, SC (refd)

Legislation referred to

Criminal Procedure Code ss 180, 259, 340, 340(2)

Penal Code ss 149, 302

Karpal Singh (Sangeet Kaur with him) (Karpal Singh & Co) for the accused.
Nur Amalina (Public Prosecutor, Attorney General's Chambers) for the prosecutor.

Badariah Sahamid JC:

CHARGE AGAINST THE ACCUSED

[1] The accused was charged under s 149 and s 302 of the Penal Code. The charge reads as follows:

Bahawa kamu bersama beberapa orang lagi yang masih bebas pada 13 hb Disember 2005 jam lebih kurang 9.30 malam dihadapan rumah No.25 Jalan Semarak 3A, Bukit Beruntung didalam daerah Hulu Selangor di dalam Negeri Selangor Darul Ehsan adalah ahli perhimpunan yang menyalahi undang-undang yang mempunyai tujuan bersama dalam perhimpunan haram tersebut untuk mengakibatkan kematian dan semasa kamu semua ahli perhimpunan tersebut satu atau lebih dari satu daripada kamu telah melaksanakan tujuan bersama kamu telah melakukan kesalahan membunuh iaitu menyebabkan kematian ke atas nama: Kannah A/L Maran(KP 840819-10-5241) iaitu satu kesalahan dimana ahli-ahli perhimpunan mengetahui mungkin dilakukan dalam melaksanakan tujuan bersama perhimpunan tersebut dan dengan itu kamu telah melakukan suatu kesalahan di bawah Seksyen 149 Kanun Keseksaan dan boleh dihukum di bawah Seksyen 302 Kanun yang sama.

CHRONOLOGY OF EVENTS

[2] On the evening of 13 December 2005 at about 6pm, the deceased, Kannah a/l Maran, his three siblings, Ratnam a/l Maran (SP4), Krishnamoorthy a/l Maran (SP8) Kovalan a/l Maran (SP5) and two friends, siblings Sakawanan a/l Elapan (SP6) and Ramesh a/l Elapan ('the Maran group') were on the pavement outside the premises of a house at No 25, Jalan Semarak 3A, Bukit Beruntung ('the Maran premises') drinking beer and talking. Another sibling, Jasmin a/p Maran (SP7) was also at home, but stayed indoors and did not join the Maran group in their drinking. At about 6.40pm two youths on a motorcycle approached the Maran group and an altercation occurred in which abusive words and threats were made against SP5. SP4 and Ramesh retaliated by attacking the two youths with beer bottles. The two youths fled on their motorcycle, vowing they would return.

[3] At about 8pm a Satria car with six passengers arrived at the Maran premises. They hurled threats and abuses at the Maran group, and accused them of being gangsters. They called out for Ramesh and attacked him. Ramesh fled the scene. A fight ensued between the passengers of the Satria and the rest of the Maran group in which golf, hockey sticks, sticks and rotan were used as weapons. The passengers of the Satria then fled at about 8.30pm.

[4] Subsequently, the parents of the deceased together with SP5 went to a police station to report the incident. The parents stayed on at the police station while SP5 returned home.

[5] In retaliation to the fight, SP4 and the deceased went to the house of the two youths who had come earlier to the Maran premises on a motorcycle. They saw two motorcycles parked at the premises — a Yamaha RXZ and a Yamaha 125. A female relative, the sister or mother of the two youths was there. Harsh words were exchanged between them. The deceased and SP4

explained that in retaliation of the earlier conduct of the two youths, they were taking the two motorcycles with them. They left a message with the woman that if her sons wanted their motorcycles back, they would have to get them from the Maran premises. SP4 and the deceased then took the two motorcycles, one of which belonged to the accused, home. They then resumed talking and drinking in front of the Maran premises together with the others.

[6] At about 10pm a group of 15–40 persons (the exact number is unascertained) arrived at the Maran's premises in a van, several cars and motorcycles. They alighted from their vehicles, smashed the porch lights in front of the Maran premises, and attacked the deceased, his siblings and friends. The group was armed with parangs, rotan and iron rods. Sticks, cangkul and broken flower pots were also found at the crime scene. SP5 and SP8 alleged that the accused was one of the persons in the group.

[7] During the fight SP4 sustained injuries and lost consciousness. SP8 also sustained injuries and lost consciousness as a result of the fight. SP8 recovered consciousness to find the group dispersing. SP4 and SP5 then brought the deceased who was then still alive but unconscious, to a clinic from where an ambulance took the deceased to Hospital Selayang.

[8] The doctor who examined the deceased on admission at Selayang Hospital, Dr GC George (SP9) testified that the deceased was admitted in a critical condition. A GCS assessment conducted on the deceased gave a very poor reading of his reflexes to stimuli and consciousness level. The deceased had also suffered a severe slash wound on his head associated with a fracture of the skull. He also sustained severe injuries to both hands. The right wrist was almost severed, while the left wrist was partially amputated. Despite efforts at resuscitation, by 15 December 2005, two brain tests conducted confirmed that the deceased was 'brain dead'. He was pronounced dead after the second brain test on 15 December 2005.

EVALUATION OF THE PROSECUTION CASE

[9] At the close of the prosecution case, it is incumbent on the court to determine whether or not the prosecution has established a prima facie case in accordance with s 180 of the Criminal Procedure Code, as succinctly explained by Justice Gopal Sri Ram (JCA as he then was) in *Looi Kow Chai & Anor v Public Prosecutor* [2003] 2 MLJ 65; [2003] 1 CLJ 734:

> It therefore follows that there is only one exercise that a judge sitting alone under s 180 of the Code has to undertake at the close of the prosecution case. He must subject the prosecution evidence to maximum evaluation and ask himself the question: If I decide to call upon the accused to enter his defence and he elects to

remain silent, am I prepared to convict him on the totality of the evidence contained in the prosecution case? If the answer is in the negative then no prima facie case has been made out and the accused would be entitled to an acquittal.

[10] The accused, Vincent Jude is charged with being a member of an unlawful assembly of persons who had the common intention of causing death to one, Kannah a/l Maran, and one or more than one of the assembly had acted on that common intention and caused the death of the abovenamed.

[11] The elements necessary to prove the above may be summarised thus:

(a) the accused is a member of the unlawful assembly;

(b) the existence of a common intention of the unlawful assembly to cause the death of the deceased; and

(c) the death of the deceased is caused by the injuries inflicted in furtherance of the common intention.

[12] The prosecution can be said to have made out a prima facie case if the prosecution has succeeded in proving all the three elements abovementioned.

ABSENCE OF MATERIAL WITNESSES

[13] The prosecution had called ten witnesses to prove its case. However, the prosecution had failed to produce at least two material witnesses whose testimonies are crucial to establish the prosecution case: the chemist who conducted tests on the alleged weapons and the doctor who performed the post mortem on the deceased.

[14] The investigating officer (SP10) testified that a parang, (exh P14) a changkul (exh P13) and a stick measuring about four feet long (exh P16) all with blood stains were recovered from the crime scene. The abovementioned items were tendered to a chemist at Jabatan Kimia. Samples of the deceased's blood, tissue, bone, hair and nail clippings were also tendered to the chemist at Jabatan Kimia. However, by an admitted oversight of the DPP, no arrangements were made to call the chemist as witness. By the time the DPP realised the oversight the said chemist was unable to attend as she was leaving the country for an extended period for further studies. Thus the chemist report (ID19) was inadmissible (*Lembaga Kemajuan Tanah Persekutuan (Felda) & Anor v Awang Soh bin Mamat & Ors* [2009] 4 MLJ 661).

[15] The doctor who conducted the post mortem on the deceased was out of the country on study leave, but had returned to Malaysia twice during the

course of the trial. However, regrettably, no effort was made by the prosecution to locate her whereabouts until almost towards the end of the trial; I refused the DPP's request for adjournment of the trial and the tendering of the said medical report under s 340 of the CPC. I have given my reasons for doing so in the course of this judgment.

EVIDENCE OF THE PATHOLOGIST AND MEDICAL REPORT

[16] In a charge for murder as in the instant case, it would not be an overstatement to say that the crux of the case depends on expert evidence of the cause of death, in other words evidence that links the injuries inflicted by the perpetrator to the death of the deceased. Such evidence is ordinarily provided by the evidence of the pathologist who performed the post mortem on the deceased.

[17] One of the issues raised before me is whether in the absence of the pathologist, a medical report can be admitted under s 340 of the Criminal Procedure Code (CPC) The necessity to invoke s 340 of CPC by the prosecution is a consequence of my refusal to grant an adjournment to the prosecution to procure, inter alia, the attendance of the pathologist, Dr Siew Sheue Feng who is currently pursuing studies in Greece.

GROUNDS FOR REFUSAL OF ADJOURNMENT

[18] Section 259 of the CPC provides for the discretion of the court to postpone or adjourn proceedings 'If, from absence of a witness or any other reasonable cause, it becomes necessary or advisable to postpone …'.

[19] I refused the prosecution's application for an adjournment because the prosecution had demonstrated a manifestly lackadaisical attitude towards the prosecution of this case. In addition the prosecution could not assure this court that even if the requested adjournment were to be granted the witnesses above could be procured. Is the court expected to delay proceedings while the accused languishes in prison waiting for the prosecution to muster the commitment and effort to properly prosecute its case? More than sufficient time and latitude had been given to the prosecution to prepare its case and this court would be failing in its duty to administer proceedings justly if a further indulgence is granted.

[20] From the court records, I gather the following: The alleged gang fight, in which the murder of the deceased is alleged, occurred on 13 December 2005. Almost fours years have passed since the incident. The accused, Vincent Jude was arrested on 11 February 2007, almost three years ago.

[21] This case was first mentioned before my predecessor YA Tuan Abang Iskandar on 3 May 2007 when the charge was read to the accused. On 12 November 2008 YA Tuan Abang set trial dates for 23 February 2009 to 27 February 2009. The dates were vacated to make way for a more urgent case and on 26 February 2009, new trial dates were fixed. The trial dates fixed were 20 May 2009 to 25 May 2009, 27 May 2009 to 28 May 2009 and 1 June 2009 to 4 June 2009.

[22] On the mention date, 26 February 2009, the DPP charged with this case had informed YA Tuan Abang that the pathologist was abroad and could not be traced and would only return to Malaysia in January 2010. YA noted in the court records what was communicated to the aforementioned DPP.

> If doctor should be back at any time before Jan 2010 this court ought to be notified so that we can set a date for his evidence to be recorded.

[23] Justice Tuan Abang Iskandar, who was informed of the pathologist's absence when trial dates were scheduled, was clearly of the view that the attendance of the pathologist was crucial and expressed the court's willingness to set trial dates to accommodate the pathologist's presence in Malaysia.

[24] From documentary evidence made available to the court to prove the absence of the pathologist from Malaysia, the pathologist had returned to Malaysia not once, but twice since the trial dates were scheduled.

[25] The first was from 10–16 May 2009 and the second from 24–29 August 2009. If the prosecution had made the effort to trace the pathologist by enquiring from the Forensic Department of Hospital KL, the prosecution would have been apprised of the dates she would be returning to Malaysia and on notification as directed by the court, trial dates could have scheduled in order to accommodate her evidence.

[26] Regrettably, it appears that no effort was made to ascertain Dr Siew's whereabouts in order to secure her attendance in court. It was only as recently as 17 September 2009 that the prosecution had enquired from the Forensic Department of Hospital KL and managed to ascertain the whereabouts of Dr Siew. There is neither evidence nor explanation as to why such enquiries had not been made earlier. The prosecution has thus failed in its duty to call all necessary witnesses essential to the prosecution case (*Ti Chuee Hiang v Public Prosecutor* [1995] 2 MLJ 433).

[27] Thus on the court's refusal to grant further adjournment, the prosecution then sought to admit the report of the pathologist, Dr Siew, under s 340 of the CPC.

ADMISSIBILITY OF MEDICAL REPORT IN CERTAIN CASES

[28] *Section 340 of the CPC* reads as follows:

> (1) Where on the trial of any person charged with culpable homicide amounting to murder or culpable homicide not amounting to murder *it is proved* that the Medical Officer who made the post-mortem examination of the body of the deceased person is dead or is *absent from Malaysia*, it shall be lawful to receive any report of that Medical Officer made under the provisions of this Code as evidence with regard to the appearances of the body when examined by that Medical Officer and as regards the cause of death. (Emphasis added.)
>
> (2) Such evidence shall be subject to such deduction from its weight as the Court deems proper to make by reason of that report not having been made upon oath and the accused person not having any opportunity of cross-examination.

[29] Defence counsel had objected to the pathologist's report being admitted on the grounds that:

(a) the documentary evidence (ID25) ie a letter from the Forensic Dept Hospital Kuala Lumpur that confirms that the above named pathologist is undergoing further studies in the University of Crete, Heraklion, Greece until January 2010, to prove the absence of the pathologist from Malaysia is not admissible as it was not tendered through the maker *Public Prosecutor v Haji Harun bin Haji Idris* [1977] 1 MLJ 14; and

(b) admitting the medical report in place of the expert's testimony in court is a grave deficiency and clearly offends the 'best evidence rule' in *Public Prosecutor v Chee Kon Fatt* [1991] 3 CLJ 2564.

[30] I am of the opinion that the prosecution has failed to demonstrate that the prosecution can invoke s 340 of the CPC, for the reasons below.

[31] In cases of injury or murder such as this, the testimony of the pathologist is especially crucial in order to prove the cause of death. It is consistent with the principle that such testimony should be through the direct oral evidence of the pathologist, where a cross-examination would allow such evidence to be tested and evaluated. Seen in this light, s 340 of the CPC must be considered as an exception to the rule that allows the evidence of the pathologist to be made through documentary evidence. This is clearly reflected in sub-s (2) of s 340 that reminds the court in no uncertain terms that:

A Such evidence shall be subject to such deduction from its weight as the court deems proper to make by reason of that report not having been made upon oath and the accused person not having any opportunity of cross examination.

B **[32]** The language employed in s 340 makes it clear that for the section to be invoked, the prerequisite is that it must be proved that the medical officer was deceased or absent from Malaysia. Thus, what s 340 envisages is an exceptional situation where the medical officer is either deceased or untraceable or cannot with due diligence be procured to give testimony. Only C then should s 340 of the CPC be resorted to.

[33] The case of *Public Prosecutor v Dulamit bin Sulaiman & Anor* [2009] 9 MLJ 249 illustrates the stringent prerequisites to be satisfied before a medical report can be admitted under s 340 of the CPC.

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[34] In the abovementioned case, Justice Nalini had allowed the post mortem report to be admitted in circumstances in which the pathologist could not be procured to give evidence in court. The pathologist in question E was an Indian citizen under contract with University Hospital. He had left Malaysia to work in India seven years ago. As a result of differences between him and the University in relation to the payment of certain allowances, he had refused to testify notwithstanding that several attempts were made to ask him to do so. Justice Nalini found that from the evidence of witnesses, despite F their best efforts the pathologist's presence could not be procured at the trial.

[35] Considering that s 340 itself expressly provides that such evidence will be of low probative value, it should only be used sparingly.

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[36] In this case before me documentary evidence show that after the trial dates had been fixed and communicated to the prosecution, the pathologist was present in Malaysia on two separate occasions, as stated earlier. It was not a case where the pathologist was untraceable but rather no effort had been H made to trace the pathologist. Certainly, it cannot be the intention of the Legislature that s 340 can be invoked in order to rectify a serious omission by the prosecution to secure the attendance of the medical officer. This would certainly be contrary to the best evidence 'rule', and highly prejudicial to the accused.

I

SERIOUS GAPS IN THE PROSECUTION CASE

[37] The absence of the evidence of the pathologist leaves a serious gap in the prosecution case.

[38] Apart from the pathologist, there were two other material witnesses that the prosecution had without reasonable cause, failed to produce.

[39] The Chemist, Puan Sharizah Alimat who had analysed the blood samples on the alleged murder weapons (parang, cangkul, kayu) and found them to be the blood of the deceased. Her evidence is material to link the injuries inflicted on the deceased to the abovementioned weapons.

[40] The deputy public prosecutor had admitted that it was an oversight on her part not to make arrangements for the chemist to give evidence in court. By the time she realised her oversight, the above named chemist could not be procured as she was preparing to leave Malaysia for studies abroad. Without the evidence of the chemist there is a serious gap in the chain of evidence linking the injuries sustained by the deceased to the murder weapons.

[41] The third witness absent is Ramesh a/l Elappan, the complainant. He had been subjected to restricted residence ('buang daerah') since 2006. The prosecution's contention is that his evidence is not material as he was only present during the first 'fight' and had run away thereafter. However, the investigating officer (SP10) had admitted that the above named is a material witness, and that little effort had been made to trace his whereabouts.

[42] Without the testimonies of the pathologist and the chemist, there is a serious gap in the narration of the prosecution case. In the case of *Abdul Jalil bin Abdul Satar v Public Prosecutor* [1991] 2 MLJ 194, where the prosecution had not given valid reasons as to why a material witness could not be traced or what efforts had been made to trace him, the Supreme Court held there was a serious break in the chain of evidence and allowed the appeal to set aside the conviction of the accused. On this ground alone it would be sufficient for this court to conclude that no prima facie case has been made out against the accused. However, for the sake of completeness I will proceed to evaluate the rest of the evidence.

EVALUATION OF EVIDENCE OF WITNESSES

[43] I turn to the evidence of SP4 (Ratnam a/l Maran), SP5 (Kovalan a/l Maran), SP8 (Krishnamoorthy a/l Maran) SP7 (Jasmin a/l Maran) and SP6 (Sakawanan) all of whom were present at the scene of the crime at the material time. I find their evidence highly unsatisfactory for the following reasons:

(a) Four out of the five witnesses abovementioned (SP4, SP5, SP7 and SP8) present at the scene of the crime at the material time were siblings of the deceased. While this in itself do not make them incompetent witnesses, it is worthy of note;

(b) SP4 had admitted to drinking with his brothers (SP5 and SP8) before the fight from about 6.30pm and continued till about 10–11pm on 13 December 2005, the day of the alleged murder. SP5 had in his evidence also admitted to being drunk. This was also confirmed by SP6;

(c) SP4 and SP8 had admitted to having passed out after being attacked. SP8 in his evidence testified that when he regained consciousness, he saw the group who attacked them dispersing;

(d) SP5, SP7 and SP8 had testified that the attackers had smashed the porch lights, thus visibility was impaired;

(e) There are discrepancies in their evidence with regard to certain material facts:

(i) Number of persons involved in the fight
According to SP4: 40–45; SP5 testified 40–45 persons during examination-in-chief and 30–40 persons during cross-examination. SP6 gave the number as 25; SP7 put it at 30; SP8: 30–40. However, according to SP10 (the investigating officer) it could not be more than 15.

(ii) Duration of the fight
According to SP5 the fight lasted for 40 minutes; SP6: Ten minutes while both SP7 and SP8 testified it was five minutes.

(iii) Description of vehicles involved
There were also discrepancies in the description of the vehicles which had ferried the 'attackers' to the scene of the crime, most notably with regard to the colour of the van: SP4, SP8 and SP7 described it as white. SP5:'coklat' (brown) and SP6, blue.

(f) The uncertainty of the identification and role played by the accused in the fight.

[44] Out of the five witnesses present at the fight, only two witnesses identified the accused as one of the persons who was involved in the fight.

[45] SP4 testified not being able to identify any of the attackers, including the accused as he had passed out during the attack. SP6 also did not identify the accused as one of the attackers. SP7 had testified being unable to identify any of the attackers as the porch lights had been smashed by the attackers and this impaired visibility.

[46] While SP8 had identified the accused as one of the attackers, he could not say who the accused had attacked as there were many persons involved in the fight. SP8 had also testified that the attackers had smashed the porch lights, thus visibility was impaired. SP8 had admitted to having lost consciousness after being attacked and only regained consciousness after the fight when he saw the group who attacked them dispersing.

[47] It was only SP5 who had categorically identified the accused as one of the attackers who had attacked the deceased.

CONCLUSION

[48] In conclusion, in the absence of crucial medical evidence of the pathologist to ascertain the cause of death of the deceased, the absence of the chemist and the inadmissibility of the chemist report to ascertain the weapons used to inflict the fatal injuries on the deceased, as well as the lack of credible evidence from witnesses present at the scene of the crime at the material time, I find no prima facie case has been proved against the accused. I therefore order the accused be acquitted and discharged.

Accused acquitted and discharged.

Reported by Ashgar Ali Ali Mohamed